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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit, entered on July 19, 1962.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A., *infra*, pp. 17–38) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's order and remanding the proceedings were entered on July 19, 1962 (App. B, *infra*,

pp. 39–40). A timely petition for rehearing was denied on April 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a producer applying for a certificate of public convenience and necessity under Section 7 of the Natural Gas Act also requests, on emergency grounds, the grant of temporary operating authority, may the Commission condition temporary authorization upon the applicant's maintaining (*i.e.*, not increasing) a prescribed initial price pending final disposition of the application?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7 (b), (c), and (e), 52 Stat. 821, as amended, 15 U.S.C. 717–717w) are set out in Appendix C, *infra*, pp. 41–47.

STATEMENT

These cases involve temporary authorizations of sales of natural gas issued to independent producers by the Federal Power Commission under Section 7(c) of the Natural Gas Act. The relevant facts are as follows:

In February, 1961, the producer respondents applied to the Commission for certificates of public convenience and necessity covering sales of additional gas from a field where some gas was already being sold under F.P.C. certificates previously issued. The additional sales were covered by 20-year contracts calling

for initial prices of 20¢ per Mcf with specified escalations. While the initial 20¢ per Mcf price was the same as that for the previously certificated sales, the escalations provided in the new contracts brought their weighted-average prices above those in the earlier contracts.

Alleging the existence of emergency conditions cognizable under the Commission's Natural Gas Regulations,[1] respondents requested temporary operating authority pending determination of their certificate applications. The Commission granted the temporary authorizations subject to the conditions that (1) the total initial price not exceed 18¢ per Mcf; (2) within 20 days, supplemental rate schedules and revised billing statements be filed consistent with the 18¢ per Mcf price condition; and (3) the temporary authorizations be accepted in writing.

Respondents commenced deliveries, submitted acceptances purporting to reserve the right to seek removal of the conditions, and filed contract amendments calling for an initial price of 18¢ per Mcf for the first thirty days' deliveries and 20¢ per Mcf thereafter. At the same time, respondents applied for rehearing of the order imposing the conditions.

The Commission denied rehearing. It also (1) rejected the amended rate schedules because they

[1] Section 7(c) (*infra*, pp. 44–45) authorizes the issuance of temporary authority "in cases of emergency." Implementing that Section, the Commission has promulgated rules (18 C.F.R. § 157.28(c)) which recognize that various types of threatened physical or economic loss (drainage of gas, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties) may constitute an emergency.

called for increases above 18¢ per Mcf during the period of the temporary authorizations, and (2) amended those authorizations so as to provide expressly that no change could be made in the 18¢ rate for the duration of the "temporaries." The Commission also rejected increases to 20¢ which respondents had tendered for filing under the revised contracts. The Commission later denied renewed applications for rehearing and again rejected the tendered rate increases.

Finally, the Commission issued a letter-order (1) permitting the revised contracts to be filed, but solely to provide a contractual basis for the collection of the 18¢ rate; (2) explaining its prior action by reference to Statement of General Policy No. 61–1 (§ 2.56, 18 C.F.R. 2.56); and (3) stating specifically that acceptance of the revised schedules for filing "should not be construed as permission * * * to file for an increased rate pursuant to section 4(d) of the * * * Act during the pendency of the temporary authorization."

The court below held that the Commission had the power, on an application for rehearing, to specify more stringent requirements or conditions than those made explicit in its original order. It further sustained the Commission's power to condition a temporary authorization on a reduction of the initial rate, rejecting the producers' contention that the Commission's authority to protect consumer interests was limited to allowing collection of the contract price subject to refund.

But the court below held further that the Commission could not lawfully condition temporary authorizations so as to prohibit for their duration the filing of rate increases under Section 4(d). While disclaiming an intention to direct the Commission's action on remand, the court below indicated (App. A, *infra*, p. 38, n. 21) that, regardless of what action the Commission might take on the applications for permanent certificates,[2] "[t]he rate represented by the proposed increase became effective on its filing subject to a maximum of five months' suspension," and, therefore, as of the end of such five months' period, respondents were entitled to collect 20¢ per Mcf subject to refund of such amount as exceeded the "just and reasonable rate" to be thereafter determined.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with the decision of the Third Circuit in *Alabama-Tennessee Natural Gas*

[2] The cases were set for hearing on the applications for certificates of public convenience and necessity. On April 11, 1963 (after the decision of the court below, but four days before its denial of the Commission's petition for rehearing), the examiner rendered his decision granting permanent certificates at the initial in-line prices of 16¢ per Mcf in six of the seven dockets here involved (Cases Nos. 19065, 19113, 19114, 19153, 19154, 19155, 19212, 19213 and 19214 below) and 15¢ in the seventh (Case No. 19156 below). The difference in initial price conditions prescribed by the examiner is explained by a difference in geographic area of the production covered.

Additionally, though not involved in the present litigation, the temporary authorization in Case No. 19156 contained a requirement of refunds in the event the initial price prescribed in the certificate was set at less than 18¢ per Mcf. The examiner has accordingly ordered refunds in that case.

Co. v. *Federal Power Commission*, 203 F. 2d 494. In addition, it determines important legal issues relating to the Commission's power to impose conditions in authorizing a producer to sell natural gas. Finally, it has far-reaching practical effects upon the Commission's ability to protect consumers from the collection of unreasonable charges—a matter of particular moment in the current phase of regulation.

1. In the *Alabama-Tennessee* case, *supra*, the Commission, after a hearing, granted a certificate of public convenience and necessity to a new pipeline. Concluding, however, that it lacked adequate experience to enable it to fix immediately a proper rate for the company, the Commission conditioned the certificate upon the pipeline's subsequent filing of a satisfactory tariff. Meanwhile, operations were allowed to go forward at a specified "interim" rate. No express condition against any increase in this interim rate was inserted in the certificate. Prior to the Commission's approval of a satisfactory tariff the company filed an increase in the interim rate. Upholding the Commission's authority to reject this filing, the Third Circuit, speaking through Judge Hastie, ruled as follows (203 F. 2d at 497):

> * * * To treat the "interim rate" permitted under the June 16, 1950 order [permitting operation at that rate] as the kind of rate which is subject to change on the free initiative of the Company under Section 4(d) is to ignore the restrictive context in which it was allowed to become effective. For it is our premise that the Commission had power to

> impose the rate condition * * *. Only after such an initial determination of a satisfactory rate in compliance with the June 16, 1950 order, could the Company properly claim that it was operating under the kind of tariff that is subject to change by Section 4(d) procedure.

If anything, the instant case is a stronger one from the Commission's standpoint. The producers here involved were granted temporary authority to make sales upon their *ex parte* representations that delay would cause them loss or hardship. Unlike the situation in *Alabama-Tennessee*, there had been no hearing on the certificate application and hence no showing by the applicants that the public convenience and necessity would be served by certification. Respondents, as noted in the Statement, *supra*, p. 4, were permitted to commence sales under temporary authority in a "restrictive context"—upon the explicit condition that they refrain from making any change in the price charged the pipelines during the period of interim authorization.

2. The opinion below adopts the view that under this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, and *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (*"CATCO"*), once a sale of gas has been authorized, the only means by which the Commission can control price increases is provided by Section 4 of the Act—*i.e.*, the Commission may suspend the increase for a five-months' period, and thereafter the

sole protection to the consumer is the Commission's power to require that collection of the increased rate be made subject to refund. These cases do not imply, however, that the Commission's powers of certification under Section 7 of the Act would not permit it to impose, as a condition of granting a certificate, a requirement that the applicant accept reasonable and specified limitations upon the filing of rate changes.[3] In any event, whatever the scope of the Commission's power to establish limitations

[3] In the *Mobile* case, *supra*, 350 U.S. at 339, this Court emphasized that § 4(d) [the price increase provision of the Act] "is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract * * *." In *CATCO*, *supra*, it is true, the Court talked in terms of holding the price line through a certificate issued at the contract price but conditioned upon payment of refunds if a lower just and reasonable price was subsequently fixed. But nothing in *CATCO* suggests that such action would exhaust the Commission's power under Section 7(e) of the Act "to attach to the issuance of the certificate *and to the exercise of the rights granted thereunder* such reasonable terms and conditions as the public convenience and necessity may require," in circumstances where the Commission could properly conclude that collection of higher rates subject to refund would not adequately protect the consuming public. (Italics supplied.) The court below has itself approved Commission decisions setting initial in-line prices below those specified in the contracts and sought by the producers' applications, though this would mean that, for at least a five months' period, the contract rates could never be collected. *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149; see also *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923; *Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A.D.C.).

And we believe it clear that the Commission might well conclude that the present or future public convenience and necessity

in connection with such filings by a natural gas company operating under a certificate of public convenience and necessity, we believe it plain that the Commission has very comprehensive powers when, in the exercise of its discretion, it authorizes a temporary or interim operation at the behest of an applicant who has not yet established any of the elements which would justify certification. Concretely, we urge that it may, at a minimum, insist that the producer-applicant sell at rates which will not disturb the existing price line pending final disposition of the application for a certificate.[4]

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militate against any grant authorizing the collection of a rate in excess of the in-line rate, at least pending determination of the rate for sales of gas from a particular area. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467 (C.A. 3), certiorari denied, 352 U.S. 891, where the court held that a Commission order entered in a certificate proceeding requiring a natural gas company to provide a specified type of service "could not be collaterally nullified through the filing of a rate schedule change." Section 4 of the Act, the court said, "is of no help to petitioner in its endeavor to so unilaterally destroy the order which had been arrived at after an adversary hearing and under which petitioner had been proceeding since its issuance. * * * What Section 4(d) provides is an alternative method of effecting changes otherwise permissible by virtue of the Act" (232 F. 2d at 473).

[4] See, also, the following cases, decided subsequent to *CATCO*, which relate to the Commission's obligation to establish an initial in-line price: *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commis-*

In refusing to draw a distinction between permanent certification and temporary authorization, the court of appeals relied heavily upon the proposition that in either case the producer is deemed to have dedicated his gas to interstate service and cannot cease operations without an authorization of abandonment under Section 7(b) (App. C, *infra*, p. 44). This analysis overlooks vital differences. Temporary authorizations are granted without notice or hearing, upon an *ex parte* showing by the producer that an emergency exists which would warrant the Commission in exercising its discretion on his behalf and authorizing the commencement of service before the statutory procedure for passing upon his application for a permanent certificate can be completed. Consumer interests have no opportunity, prior to the grant of such temporary authority, to be heard on the crucial issue of price. In these circumstances, the producer who has been authorized to commence operations—thus avoiding the adverse consequences to him of a delay in operations—surely has no right to complain because, pending final disposition of his application, the Commission does not permit him to collect more than the price which it has generally found consistent

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sion of New York, 365 U.S. 880; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 150 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

with the public interest.[5] As the Fifth Circuit itself held in *American Liberty Oil Co.* v. *Federal Power Commission*, 301 F. 2d 15, 18—a decision approving the fixing of a price for a temporary authorization at a level below that established by the producer's contract—the Commission's exercise of discretion in granting temporary authorizations can be modified or set aside, if at all, only when the Commission's action is a clear abuse of discretion, *i.e.*, "arbitrary, whimsical, or capricious * * * or * * * otherwise as a matter of law erroneous on its face * * *."[6] And the *Alabama-Tennessee* decision, *supra*, attests that it is

[5] The necessity to secure Commission approval prior to any abandonment does not change the preliminary nature of the authorization. For the producer, before opting to commence service, will know the price at which the Commission is willing to permit operation. Throughout the period, of course, the producer, who has dedicated his gas to the interstate market in advance of the certification proceeding fixing the in-line price, risks a determination that the in-line price may turn out to be less than that fixed in the temporary authorization. But surely that possibility does not warrant the charging of a still higher rate during the earlier period. The applicant can always reject the temporary authorization offered and await decision on the certificate application before commencing operation.

[6] Other decisions raise doubt as to whether orders granting temporary authorizations are reviewable even to this extent. *J–T Transport Co.* v. *United States*, 191 F. Supp. 593, 600 (W.D. Mo., 3-judge); *M. P. & St. L. Express, Inc.* v. *United States*, 165 F. Supp. 677, 681 (W.D. Ky., 3-judge); cf. *Jay* v. *Boyd*, 351 U.S. 345, 351. But cf. *Schenley Distillers Corp.* v. *United States*, 50 F. Supp. 491, 496 (D. Del., 3-judge); *Pennsylvania R.R. Co.* v. *United States*, 13 Federal Carrier Cases, par. 81,256 (E.D. Pa., 3-judge); *Bowen Transports, Inc.* v. *United States*, 116 F. Supp. 115 (E.D. Ill., 3-judge); *Mercury Freight Lines Inc.* v. *United States*, S.D. Ala. Civil No. 1609 (3-judge), decided April 27, 1956.

anything but arbitrary to require that conditions which the Commission may assuredly prescribe at the outset shall be preserved while the application of the natural gas company is awaiting its final disposition by the Commission.

3. The conclusion that the Commission has acted reasonably is fortified by a consideration of the practical consequences which might follow if the Commission were to adopt any other course.

One starts, of course, from the proposition that the Commission's primary obligation is to protect the consumers of natural gas. *CATCO, supra; Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591. See also, *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145. The cornerstone of the regulatory scheme is a prohibition of interstate transmission and wholesale sale of gas until the company has demonstrated, in a full hearing at which consumers' interests may be represented, that the proposed transactions will serve the public convenience and necessity. And the prices at which sales will be made are a critical consideration in determining the public interest involved. *CATCO, supra.*

Inherent in the statutory procedure is an inevitable delay between the filing of an application for a certificate and the Commission's final action thereon. It is true that if a producer were granted temporary authority and permitted to file rate increases pending the completion of the certificate proceedings, such increases could be suspended for five months and an ultimate refund obligation imposed. But the task of determining just and reasonable rates in Section 4

producer proceedings has been the principal source of delay in the conduct of the Commission's business. Refunds, moreover, are far from a perfect or complete remedy. *Federal Power Commission* v. *Tennessee Gas Transmission Co., supra.*

As the Court is aware, the Commission aims to meet the major problems associated with the regulation of prices charged by independent producers by abandoning individual company cost-of-service pricing in favor of a multi-company area approach. *Wisconsin* v. *Federal Power Commission,* Nos. 72–4, Oct. Term, 1962, decided May 20, 1963. As the Court also knows, *ibid.,* the transition to the new pricing system creates numerous problems if gas prices are not to get out of hand during the interim period. Not the least of these is the treatment of rate increase filings covering permanently certificated sales.[1] This problem has been attacked by the Commission with considerable success to date through (1) the establishment for various producing areas of guideline prices which mark the point at which filed rate increases will be suspended and (2) the designation for immediate hearing and disposition of the limited number of those rate filings which, if allowed to go into effect subject to refund, would, through "triggering" or otherwise, result in a more general increase in the price level.

This effort to hold the line would be seriously im-

[1] Consideration is being given to the advisability, in appropriate cases, of conditioning the grant of permanent certificates on the maintenance, for a specified time, of the in-line initial price determined in the certificate hearing.

paired if the Commission were also compelled to establish promptly the justness and reasonableness of rates for the numerous sales temporarily authorized. In recent years, the Commission has been issuing temporary authorizations to producers at a rate of more than 1,500 annually. More than 2,000 producer applications for certificates are now pending. Considering the volume of applications involved, the decision below, if permitted to stand, might well require the Commission, in the interest of consumer protection, to deny requests for temporary authority involving the risk of any increase beyond the guideline prices fixed by the Commission as the appropriate interim levels.

This course, paradoxically, would probably have its most serious consequences for independent producers, *i.e.*, for persons of the very class to which these respondents belong (although consumers, too, have a vital interest in matters of supply). The physical and economic facts of gas production are such that administrative delay in the disposition of applications for certificate authority may cause considerable hardship. For gas which cannot be sold must often be flared, *i.e.*, permitted to escape from the well and burned off. In other cases, gas which is not sold will be drained off by adjacent wells from which sales are authorized. In still other cases, the producers, as lessees, will be contractually obligated to pay so-called "shut-in royalties" even though they cannot sell the gas. To take care of these various situations, the Commission, by appropriate regulation (see *supra*, p. 3), has prescribed the conditions which it will consider emergencies warranting the issuance of temporary authorizations.

Such temporary authority is granted under the express provisions of Section 7(c) and, as already noted, without notice or hearing, upon a producer's *ex parte* showing that he is faced with serious hardship. It is granted at a guideline price which the Commission believes is sufficiently low to protect consumers prior to the hearing, at which stage all interested parties will have opportunity to establish their positions as to the initial price at which the sale should be permanently certificated. Where, as here, a producer's contract permits him to file for a higher price, maintenance of this guideline price for the interim period (*i.e.*, until his certificate application is acted on) can be assured only if the rate-increase mechanism of Section 4(d) is not available to the producer operating under temporary authority. If the Commission cannot afford consumers this protection, while permitting producers to avoid the harsh consequences of delay, the only workable alternative, in many cases, will be to deny the temporary authorization altogether.*

The Commission's practice, in short, has been one designed to give adequate protection to both producer and consumer interests—to allow the producers to

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*In some cases, where the sales volumes are low and the higher prices authorized by the contracts are at or below other prices already being generally collected in the area, it might be feasible to rely upon the refund condition which could accompany any increased rate a producer put into effect subsequent to the statutory five months' suspension period. But see *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, *supra*. However, this limited remedy clearly would not suffice where, as here, the contract price was at a level which could lead to considerable triggering of existing contracts and thus threaten the entire area price line.

make sales under temporary authorizations when faced with emergencies; to afford consumers reasonable assurance that the price of any sale temporarily authorized is in line and will not be radically changed pending a full hearing and determination of the certificate application. This approach, we submit, is not only immune to a charge of arbitrariness; it is also, and more importantly, calculated to serve the public interest in the continuing production and sale of gas upon reasonable conditions.

CONCLUSION

The decision below is in conflict with the decision of another circuit and raises issues of very substantial public importance. This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

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JULY 1963.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 19065, 19113, 19114, 19153, 19154, 19155, 19156, 19212, 19213, 19214

H. L. HUNT; W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUSTEE; CAROLINE HUNT SANDS; J. A. GOODSON, TRUSTEE FOR CAROLINE HUNT TRUST ESTATE; A. G. HILL, TRUSTEE FOR LAMAR HUNT TRUST ESTATE; NELSON BUNKER HUNT, PETITIONERS

versus

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

(July 19, 1962)

Before BROWN, WISDOM and BELL, Circuit Judges.

BROWN, Circuit Judge: These cases raise the common question of whether the Federal Power Commission in granting a temporary certificate for the sale of natural gas at a specified initial sales price may lawfully prescribe as a condition that such price may not be increased without express approval of the Commis-

sion. The effect of such a condition is to deny to the producer the opportunity of filing a § 4(d)(e) subsequent rate increase. We hold that the Commission may not thus effectually condition-out a statutory right which Congress has prescribed. We therefore sustain the attack of the Producers who petition for review and reverse the Orders of the Commission.

While this question is almost submerged in the seemingly unavoidable flood of papers which consumes another natural resource while adjudicating this one, each of these ten separate petitions for review and the underlying orders, petitions for rehearing, orders on rehearing, and post-certification orders present substantially the same facts. Fortunately, what we can readily identify as the natural gas Bar, shows a commendable cooperation in streamlining into a single consolidated record and consolidated briefs and argument all of the essential materials—but no more—without costly repetition or duplication.[1]

While, as we stated, these involve many different dockets concerning rates or sales in the Alvin, Alta Loma and Chenango Fields within the Texas Railroad District No. 3, for all practical purposes the cases are

[1] The procedure worked out by trial and error and a good deal of give and take by the Solicitor of the Commission, counsel representing various parties and intervenors, and our Clerk over the past five years in the handing of these complicated records in natural gas cases is the source for our recently adopted rule prescribing a like optional procedure for general cases. The essence of it is that briefs are exchanged before the record is printed so that counsel, in thereafter jointly designating the printed record, know exactly what is, and is not, presented. Thus, in this case covering these ten dockets, plus another (No. 19,218), everything required is covered in 320 printed pages. This is a practice the Court encourages.

See Amended Rules 24(a), 5 Circuit, effective as of June 1, 1962.

the same and present this one basic question. Moreover, very little factual detail even as to a typical case is needed. Some dates and times are, however, important in showing the sequence and to pinpoint the complaints of the Producer. A brief synopsis of the Alta Loma proceedings will suffice.[2]

On July 1, 1960, the Commission issued a permanent certificate under § 7(e) to the Producer for the sale of gas to the pipeline purchaser. The rate prescribed was 20¢ Mcf. The 20-year contract as originally proposed called for an initial price of 20¢ with four escalations of 2¢ each every four years. In granting the permanent certificate, the Commission required that this be altered by prescribing a single 3¢ escalation at the end of the first ten years. This was accepted and service commenced. That Order, as such, is not under review in these cases.

Thereafter new production was brought in on this pooled gas unit. On December 15, 1960, the Producer entered into individual gas sales contracts with the Pipeline purchaser for the sale of this additional gas. The price fixed was 20¢ Mcf, but with four 2¢ escalations.[3] Thereafter on February 27, 1961, the Producer applied to the Commission for a Certificate of Public Convenience and Necessity to make these sales. It sought also temporary authorization to begin service immediately, alleging the existence of an emergency situation resulting from "the necessity of pay-

[2] These are the subject of our dockets 19113 and 19214, and 19114 and 19213 concerning Commission Docket Nos. CI61-1283 and 1282, respectively.

[3] It now seems to be agreed that, despite some ambiguous discrepancies, under the peculiar mechanics of certain adoptive contracts, the rates in the sales contract in Docket Nos. 19153, 19154, 19155, 19156 (covering Commission Dockets Nos. C-161-1343, 1344, 1345 and 1346) are 20¢ with a single 3¢ escalation at the end of ten years.

ing shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than" the pipeline Purchaser.[4]

It is helpful to digress here to point out two things. First, while the initial price, 20¢ Mcf was the same as the currently effective permanent certificate covering gas from the same field to the same pipeline Purchaser, the escalation provisions were markedly different, and on a total weighted average the price was greater. Second, and of more importance, between the date of the issuance of the permanent certificate covering the sale of gas from this same field to the same pipeline Purchaser, the Commission issued its Statement of General Policy No. 61–1, 18 CFR § 2.56, 24 FPC 818. In this Statement it established area price standards to be used as guides in determining where the proposed initial rates should be certificated without a price condition. The "initial service rate" established for Texas Railroad District No. 3 was 18¢ Mcf. Of course the application of February 27, 1961, was for a new certificate and was a transaction expressly evisaged by 61–1. No reference in the application was made by the Purchaser to Statement 61–1 and, oddly enough, none was made in these terms by the Commission until long after the petition for review machinery had been set in motion by the Producer.

Presumably in the usual form and without the statement of any reasons, the Commission by letter order of April 7, 1961,[5] issued the temporary authority to sell the gas as proposed in that docket, but "subject to

[4] This is a prerequisite to the invocation of the temporary-authorization provisions of § 7(c) and Natural Gas Regulations § 157.28(c), 18 CFR § 157.28(c).

[5] This Order of April 7 is the first Order under review in this proceeding. See note 8, infra.

the following conditions," which for ease of reference we identify in brackets [1], [2] and [3]:

> [1] That the total initial price not exceed 18 cents per Mcf. at 14.65 psia;
>
> [2] that there be filed within 20 days a supplement to the rate schedule consistent with [1] above and a revised billing statement;
>
> [3] that the temporary authorization be accepted in writing by a responsible official of the company.

On May 5, 1961, the Producer filed its acceptance of this temporary authority but without prejudice to a claimed right to seek removal of conditions [1], [2] and [3] and to seek an increased rate in accordance with terms of the amended rate schedule filed contemporaneously. Filed presumably in compliance with Condition [2] was a contract amendment stating that the initial price would be 18¢ Mcf for the first thirty (30) days following commencement of deliveries and thereafter 20¢. Deliveries had, in the meantime, commenced under the temporary authorization on April 19, 1961. Contemporaneously with the filing of its acceptance, the Producer also formally sought rehearing of the Order of April 7 imposing conditions [1], [2] and [3].

Again we digress to point out that the Commission did more than deny the petition for rehearing. It changed its Order of April 7 substantially. This action forms an additional complaint of the Producer here. That action was taken on May 31, 1961. That Order (a) denied the application for rehearing, and (b) rejected the amended rate schedule on the ground it appeared to authorize an increase from the 18¢ rate during the continuance of temporary authorization. Then, to remove doubt it (c) expressly modified the language of the authorization to provide explicitly that

no change from the 18¢ rate could be made during its term.[6] And finally, because of (b) and (c), the Order (d) rejected a proposed filing of a 20¢ rate made in accordance with the amended contract.[7]

The Producer filed a timely application for rehearing of the Order of May 31 and shortly thereafter formally retendered its acceptance of the temporary authorization and also the increased-rate filing to 20¢. On July 26, 1961, the Commission denied the application for rehearing and rejected the retendered increased-rate filing.[8] Timely petitions to review the Commission Order issuing temporary authorization subject to conditions and the Commission Order rejecting the Producer's purported acceptance, its filing of an amended rate schedule, and its filing of increased rates were thereafter filed.

While that ordinarily would be the cutoff date, the record as certified shows that subsequent action was taken by the Commission. On November 2, 1961, the Commission sent the Producer a Letter Order which

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[6] The letter Order of May 31 prescribed that condition [1] of the letter Order of April 7, 1961, was "modified to read as follows:

"[1] that the total initial price under this authorization shall not exceed 18¢ per Mcf * * *, with such rate to be effective for the duration of the temporary authorization and until a different prospective rate is established."

[7] The notice of proposed change in the rates was filed on May 12, 1961, to be effective on May 19, 1961 in accordance with the terms of the amended contract. Deliveries had commenced 30 days earlier on April 19, 1961. No question has been raised about the sufficiency of that notice or its operative effect generally under § 4(e).

[8] The Order of May 31 including the action on July 26 is the subject of the second petition to review filed in this Court. See note 5, supra.

Thus we see how the paper mill burden may increase by operation of the mandatory rehearing prerequisite of § 19(b).

amplified its previous orders and modified them on one respect. This letter undertook to state reasons for the prior action generally in terms that the imposition of the 18¢ price condition was taken in keeping with policy Statement No. 61–1. It further stated that upon reconsideration, the Commission had determined that it should permit the filing of the contract amendment which it had rejected earlier. This was, the Commission explained, merely to afford a contract basis for the collection of the authorized 18¢ rate. It was made clear, however, that this was "for the express purpose of permitting there to be on file the contractual agreement between you and [the pipeline Purchaser] under which you will be receiving 18¢ per Mcf." And it sounded the warning that "this should not be construed as permission for you to file for an increased rate pursuant to section 4(d) of the * * * Act during the pendency of the temporary authorization." The Commission thus made plain that in the new condition of the Order of May 31, 1961,[9] it was speaking precisely in terms of the use of the statutory right to file rate increases under § 4(d) of the Act.[10]

The Producer asserts three principal complaints, the first two of which we think have no merit.

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[9] See note 6, supra.

[10] The Commission's letter of November 2, 1961, continued: "The condition in the temporary authorization preventing you from charging or collecting more than 18¢ per Mcf during the term of that authorization without express and prior Commission approval is necessary to permit the Commission to carry out its duty to give careful scrutiny to producer prices in issuing permanent certificates. See *e.g.*, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378. If you were to be allowed to use the procedures of Section 4(d) of the Natural Gas Act during the period of your temporary authorization, the Commission could not prevent increased rates from becoming effective even though those rates might irrevocably breach the price line or trigger price increases. * * *."

There is, first, the contention that after the grant of temporary authorization by the Order of April 7, 1961, imposing its Conditions [1], [2] and [3], the Commission could not make these conditions more onerous by its Order of May 31. It emphasizes two things, one of which is that condition [1] spoke precisely in terms of the *"initial price"* not exceeding 18¢, the other being that it commenced deliveries on April 19, 1961. The suggestion seems to be that this is too much the changing of the rules in the middle of the game. There is nothing to this. The Producer sought a change in the rules. The Producer was unhappy with the Order of April 7 and—by its conditional acceptance with express reservation of rights and its simultaneous application for rehearing—sought to obtain a new ruling by the Commission. If anything as fresh as the Order of April 7, 1961, had to have anything to keep it alive as a matter within the continued reconsideration of the Commission at least during the 60-day period allowed for appeal to the Court of Appeals, the application for rehearing was more than enough. The petition for rehearing is not a one-way street. It seeks a reconsideration. A reconsideration carries with it the imminent prospect that things will be worse, not better, after rehearing.

Somewhat akin to this criticism is the further procedural one that the Letter Order of November 2, 1961, is of no consequence in this record. The Commission asserts that since this occurred prior to its certification of the record, the Commission continued to have jurisdiction. §19(b), 15 USCA §717r(b). But we do not have to decide this specifically. The reasons asserted, perhaps retrospectively, in support of its May 31 modification is but a forecast of the rationale elucidated by the General Counsel to sustain the Order. In any case, it is the Order that is in

issue. What the Commission says, as with the Court's opinion, is of great importance and its intrinsic weight is not affected by the time of its deliverance when, as was the case here, it is on a temporary certificate, as to which no formal record is or can be made. So far as the modification which allows the filing of the amended contract, previously rejected by the Commission, is concerned we regard that as an accomplished fact. It merely spells out what is otherwise so plain in the Commission's actions that it was permitting the sale under a contractual arrangement, but on the express positive condition that no increases in the rate would be allowed whether in, or not in, the contract.

The second complaint is more substantial. In effect it is that there was no reasonable basis for requiring a price reduction from 20¢ to 18¢. If the Producer were to establish this contention, it is not likely that, at this juncture, we would even reach the problem of the prohibition of § 4(d) increases.

Both as to the specific reduction in the initial sales price and in the related problem of requiring a price reduction—as distinguished from collection of the contract price under an obligation to refund the difference—great reliance is placed upon the decisions of the 10th and 7th Circuits in the cases reversing the BTU adjustment condition. *The Pure Oil Co.* v. *FPC,* 7 Cir., 1961, 292 F. 2d 350; *Sohio Petroleum Co.* v. *FPC,* 10 Cir., 1961, 298 F. 2d 465; *Eason Oil Co.* v. *FPC,* 10 Cir. 1961, 298 F. 2d 468; and see also from the 3d Circuit, *J. M. Huber Corp.* v. *FPC,* 3 Cir., 1961, 294 F. 2d 568. For our present purposes, we can accept the standards elucidated in those opinions, but they do not compel any reversal here.

It is important to bear in mind a factor we discuss in greater detail later on. We are here dealing with tem-

potary authorization. There is, and can be, no formalized record in the traditional sense. What tools are we to use, then, by which to construct a thesis showing that it was completely arbitrary for the Commission to have required an effective reduction in price? The Producer emphasizes the previous permanent certification of a 20¢ rate in the related sale. But aside from whatever uncertainty is now cast upon that decision,[11] we think a good deal of water has gone over the dam which at least warranted the Commission taking an individualized look. One, of course, is the policy Statement 61–1 with its area pricing approach whose fetal development ought not to be imperiled by prenatal traumas inflicted by restraints or restrictions from the judiciary. Equally important is the declaration from this and other Courts concerning the nature of the evidence required on the hold-the-line policy of CATCO.[12] In addition to these intervening events of

[11] There is some suggestion that this might be affected by the action of the Court of Appeals in Public Service Commission v. FPC, D.C. Cir., 1961, 295 F. 2d 140, cert. denied, December 18, 1961, 368 U.S. 948, 82 S. Ct. 388, 7 L. Ed. 2d 343, reversing the Commission's refusal to allow the New York Public Service Commission to intervene.

[12] United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, cert. denied sub nom, Sun Oil Co. v. United Gas Improvement Co., 1961, 368 U.S. 823, 82 S. Ct. 41, 7 L. Ed. 2d 27; United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F. 2d 817, cert. denied sub nom, Superior Oil Co. v. United Gas Improvement Co., 1961, 365 U. S. 879, 81 S. Ct. 1030, 6 L. Ed. 2d 191, and California Co. v. United Gas Improvement Co., 1961, 365 U. S. 881, 81 S. Ct. 1030, 6 L. Ed. 2d 192; United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159; Public Service Commission of New York v. FPC, D.C. Cir., 1960, 287 F. 2d 146, cert. denied, sub nom, Hope Natural Gas Co. v. Public Service Commission of New York, 1961, 365 U. S. 880, 81 S. Ct. 1031, 6 L. Ed. 2d 192, and Shell Oil Co. v. Public Service Commission of New York, 1961, 365 U.S. 882, 81 S. Ct. 1030, 6 L. Ed. 2d 192.

considerable administrative-legal significance, the rates in all but the Chenango Field (see note 3, supra) carry ultimate rates considerably in excess of 20¢ Mcf. We are asked on this skimpy record, unaided either by traditional evidence or that of expert economists, to say as a matter of law that a contract with four built-in 2¢ escalations does not have an inflationary or triggering effect. On the assumption that the collection of the increases is ultimately allowed, it is quite plain that over the life of the contract the price for all gas delivered was 20¢ plus. We would assume that what is so inescapable as a matter of economics would be understood in the same way by practical men in the business of selling and buying natural gas.

Nor do we find any basis for attacking the Commission's choice between a reduction in the initial price, rather than an order permitting collection of the contract rates subject to refund. There are a whole host of problems, legal and administrative, wrapped up in this choice. In the Commission's limited facility for study of the probable ultimate merits of a sale when considering an application for temporary authority, the circumstances would, we think, have to be quite unusual to warrant a Court differing with this conclusion inevitably calling for the nicest of expert judgments.

But we view the express prohibitions of § 4 increases as beyond the pale of administrative discretion. We do not think that under the guise of a condition of a temporary authorization, the Commission can forbid what Congress has expressly allowed to a natural gas producer. We reach this conclusion by application of the principles discussed and followed in *Texaco, Inc.* v. *FPC,* 5 Cir., 1961, 290 F. 2d 149, and *American Liberty Oil Co.* v. *FPC,* 5 Cir., 1962, 301 F. 2d 15.

We do not, however, regard, as do the parties in various aspects, that either or both of these decisions is directly and positively controlling. As is perfectly plain, there is and must be a difference between a permanent certificate and a temporary authorization. Consequently, what is said in *Texaco* with regard to action permissible for a permanent certificate does not necessarily apply for a temporary." On the other hand, the opposite is not necessarily true.

These cases start with the recognition that conditions may be imposed. And, of course, the factor deemed to be of such importance in *CATCO* was the beginning price. Thus, the Supreme Court held, the Commission, without making a rate case out of it, had the duty to take into account price as that might bear specifically, generally, immediately or remotely, on the public interest. In *Texaco* we did, of course, state that "The power of the Commission to condition a certificate is co-extensive with its power to reject or deny a certificate * * * because the power to reject an application for certificate completely is harsher than the power to grant it on any reasonable condition," 290 F. 2d 149, 156. But we did not intend this to declare that since the Commission had it within its actual power not to grant an application, it could therefore impose any conditions that, no matter how harsh in fact, were somewhat less than a complete refusal. We had earlier expressed it in terms such as these: "* * * it can hardly be argued that the Commission would not have had the power, *if it made a soundly based finding* that the public convenience and necessity did not warrant its granting of a certificate at an initial price higher than

[11] Along with shorthand references to § 4 and § 5 proceedings, etc., the words "temporary" or "temporaries" seem destined to become a part of the jargon too.

17.7 cents, to deny the certificate out of hand." 290 F. 2d 149, 155 (emphasis added).

The idea of reasonableness was therefore implicit in equating outright denial and grant subject to conditions. We spelled it out plainly in *American Liberty* where, of the grant of a temporary we declared, "This is not to say that the Commission can act arbitrarily, whimsically or in a manner that amounts to a clear abuse of its discretion." 301 F. 2d 15, 18. Elaborating on this we then adopted as our own the standards suggested by the Commission. "The reasonableness of the Commission's determination must be viewed in light of the summary and ex parte nature of a grant of such temporary authorization * * *" and "* * * the Commission's action * * * can be set aside only if the court were to determine that the order issuing a conditioned certificate was a clear abuse of discretion, i.e., arbitrary, whimsical, or capricious action, or that the order was otherwise as a matter of law erroneous on its face." 301 F. 2d 15, 18.

This envisages, of course, that there is a line past which the Commission may not go. The line is different for a permanent, rather than a temporary. The line may be a fuzzy one and difficult to locate. But somewhere there is a mark.

Up to now the line has not been permitted to go so far as to obliterate specific sections of the Natural Gas Act by requiring that one seeking to make an interstate sale must agree to forego and relinquish for an indefinite period of time safeguards and rights which Congress had established. On the contrary, what was done in *Natco* and by us in *Texaco* demonstrates that the necessity for conditioning a grant of a certificate is to fulfill the aims of the Act by an accommodation of all of its demands. Thus, the

Court in *Oatco* had this to say. "In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act." 360 U.S. 378 at 391. In a very practical way we made just such an accommodation in *Texaco*. Thus, by rejecting a highly legalistic impediment supposedly founded on *Mobile*,[14] we categorically stated that the price condition in the certificate would not prohibit the producer from filing, as soon as the sales contract otherwise permitted, a rate increase under § 4 which would thereafter be subject to suspension and collection under the obligation of reimbursement. This was a recognition that while, as a condition to a grant, the Commission would require the parties to commence the sale at a price lower than that fixed in the contract, the contract thereafter did not cease to have vitality. The so-called "revision of the contract obligation" resulting from condition imposed by the Commission does not, we said, "amount to a revision of the contract obligation of the parties between themselves except to the extent only that the Commission has a legal duty to deny the producers the right to receive, at least for a limited time, part of the benefits the parties have agreed among themselves it is entitled to." 290 F. 2d 149, 156.

Without even remotely implying that a permanent and a temporary are to be treated always alike, we can see no distinction in this area when viewed either as a matter of statutory power in the Commission or

[14] United Gas Pipe Line Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

statutory rights accorded to a natural gas producer, or both. If, as we held may legally be done, the producer may increase rates and thereafter collect them subject to suspension and refund under § 4, it is obvious that the *Catco* price "line" sought to be maintained by the condition is not the one currently being observed after the permissible § 4 increase. From the standpoint of the payments the purchaser is required to make, the actual price is in fact above the "line." Of course that makes maintenance of price line something less than completely effective. But that is the unavoidable consequence of a unique statutory regulatory scheme in which, as *Mobile* (see note 14, supra) points out, rates are initially prescribed (and increased) by private contract. Not everything is lost, however, since, as *Catco* contemplated, any contract increases are collected subject to refund. Additionally, this puts the burden of establishing lawfulness of the rates on the producer. Also it eliminates the prospect of irretrievable excess payments even though, in a lumbering and prolonged § 5 rate investigations, the initial price is found to be too high. Veiwed in this light we see no real distinction between a permanent and a temporary. Both in terms of the effectiveness and in terms of economic impact, the collection of a post-condition § 4 increase is the same for a temporary as for a permanent.

To allow this prohibition of § 4 condition, we would be as much as saying that in determining whether the addition of the proffered gas to the interstate market serves the public interest the rates to be prescribed are not those fixed under the sales contract by the parties. Rather the rates are those (a) fixed by the Commission in the first place and which are to continue until (b) the Commission itself fixes another level. This is a complete abandonment of the

approach deliberately selected by Congress and which, all must agree, was a radical break with traditional utility-type regulation.

The consequences are too awesome for us to assume that Congress ever committed such undefinable legislative judgments to an administrative agency. There is, first, the status of the producer under a temporary. His rights may be temporary, but his duties are not, or at least on the present holding they are not. Like the ancient covenant running with the land, the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission, on appropriate terms, permits cessation of service under § 7(b), 15 USCA § 717f(b). *Sun Oil Co.* v. *FPC*, 1960, 364 U.S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639; *Sunray Mid-Continent Oil Co.* v. *FPC*, 1960, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623; *Continental Oil Co.* v. *FPC*, 5 Cir., 1959, 266 F. 2d 208. That means that, for good or evil, a producer under a temporary is subject to all of the regulations, restraints and duties of a natural gas company, § 2(6), 15 USCA § 717a(6). Nothing in § 4 or in § 7 outlining the grant of certificate, or anything elsewhere in the Act takes from such producer the rights as a natural gas company which the law accords as a part of the duties imposed. Such producer is required under § 4(a) as a "natural-gas company" to maintain "just and reasonable" rules, regulations and rates, is forbidden under § 4(b) to "make or grant any undue preference" in "rates, charges, services, facilities * * *" and under § 4(c) is obliged to maintain and "keep open * * * for public inspection" its "schedules showing all rates and charges for * * * sale * * *," and under § 4(d) to make no change, without Commission approval, except upon "thirty

days' notice." Finally, the critical § 4(e) prescribes that such proposed rate shall be in effect. It first provides that whenever a new rate is filed by a natural gas company "the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate * * * and, pending hearing * * * may suspend the operation of such schedule and * * * rate, * * * but not for a longer period than five months * * *." But it then goes on to provide that "If the proceeding has not been concluded and an order made at the expiration of the suspension period * * *" then on motion of "the natural gas company" the "proposed * * * rate * * * shall go into effect * * *."

Moreover, this subjugation of such a producer under a temporary to the almost perpetual control of the Commission is more than an academic theoretical. It is a clear and present—and largely unavoidable—fact. It is no reflection on the Commission or its over-burdened and energetic staff to take practical cognizance of the great delay in processing these matters. On the contrary, one can have only a genuine respect for the manner in which all grapple with this monumental and increasingly unmanageable task as the result of fallout from *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035. But despite strenuous efforts and the importation of resourceful, new plans and methods for coping with it, the fact is that progress is slow, so slow indeed that it is hardly progress.[18]

[18] In the report of the Commission, Opinion No. 338, in the *Phillips* case of September 1960, 24 FPC 537, demonstrating the absurdity of a traditional cost of service approach, the Commission described its plight in these words. "An illustration of the administrative impossibility of separate determinations for all producers' rates is found in the fact that there are 3,372 independent producers with rates on file with this

Even from our remote position, it seems safe to conclude that never will the Commission be able to process certificates on an individualized basis. The hopes for a practical solution must rest in generalized area pricing or similar resourceful adaptations of law and

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Commission. The producers have on file with us 11,091 rate schedules and 33,231 supplements to these schedules. Currently, 570 of these producers are involved in 3,278 producer rate increase filings now under suspension and awaiting hearings and decisions. The number of completions of independent producer rate cases per man-year during the first 6 years following the Phillips decision indicate that nearly 13 years would be required for our present staff to dispose of the 2,313 cases pending on July 1, 1960. Within this 13-year period an additional estimated 6,500 cases would have been received.

"Thus, if our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D.—eighty-two and one-half years from now. Of course, we could expect to improve our techniques and thus shorten the time required to process these cases. If we increased our efficiency one thousand percent, we would achieve current status in 1968—eight and two-tenths years from now. * * *." 24 FPC at ——.

The Commission, with whatever help it can marshal from Congress, perseveres in its determination to make some headway. Justifiably pointing to some improvement the Commission's outlook is very guarded. The Commission's first quarterly report (Release No. 11,991; G-6559) of May 1962 reflects that "* * * the Commission had made a small reduction in its backlog of independent producer gas certificate cases during the year * * *," reducing them from 3,122 to 3,026. But in the 3,026 producer certificate cases pending as of March 31, 1962, a total of 2,096 have been granted temporaries. Headway is being made. In the first quarter of calendar year 1962, a total of 606 certificate cases were disposed of in contrast to 217 in the previous quarter and 301 in the same quarter of 1961. However, the backlog will be a long time fixture for against 606 dispositions, there were 423 new filings. At today's pace the dispositions exceed new filings on an annual basis

life."[16] But assuming its legal validity will be upheld broadly enough to make it effective, even this can not be counted on for much immediate help. Speaking of this "new system" of area pricing and the time before it can be established, Judge Prettyman stated (see note 16, supra), "This period will be long, estimates running from four to fourteen years."[17]

This is important for we have to view Commission action in terms of its broad and inescapable impact. It is no answer to the awesome implications thus revealed to suggest that as to these particular dockets, the Commission has, so we are informed, assigned

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by a net of some 720 cases. Thus it will take 4½ years to eliminate the backlog of 3,026 cases.

In independent producer rate filings and actions, there were 2,845 filings under suspension aggregating $168,654,424. Many of these are involved in the two area rate proceedings, one of which is now in progress in Docket No. AR61–1, but the Commission concludes a "significant decrease in number of suspensions on hand is not anticipated pending conclusion of [the first area rate] hearing."

The Commission through its chairman is currently seeking a 31% increase in appropriations to obtain an adequate staff to eradicate this obstacle.

[16] The hopes and fears of all the years—for the natural gas business at any rate—is portrayed by Judge Prettyman with his characteristic brilliance in the opinion of the Court of Appeals sustaining the Commission's decision in the *Phillips* case. State of Wisconsin v. FPC, 16175; Long Island Lighting Co. v. FPC, 16177; People of the State of California v. FPC, 16180, D.C. Cir., 1961, — F. 2d —. With certiorari having been granted, —— U.S. ——, —— S. Ct. ——, 8 L. Ed. 2d 275 [30 L.W. 3353], the decision of the Supreme Court will be portentous.

[17] In seeking the increased appropriations (note 15, supra), the chairman is reported as testifying that the present Permian Basin area rate proceeding would not be settled for a year or two. Moreover, until it and the South Louisiana proceeding are well along, the Commission would not likely initiate any others.

them to a hearing which, perhaps by now has actually taken place. The problem presented in these hearings will be essentially the one presented in *Catco* and if it, and the many other numerous cases coming to this Court from the Commission, are any guide, it is almost certain that we are dealing with orders which cannot become final for two or three years more." Time is therefore important. Time is a part of the problem for adjudication. In view of the structure of the Natural Gas Act, this time is irreplaceable to the producer. This is so even though the decision of the Commission on the grant of the permanent or, perhaps even later, in a § 4 or § 5 determination of just and lawful rates approves the proposed initial contract rate (or at least one higher than the conditioned rate).

And finally, the condition is so awesome because—and it is no more *reductio ad absurdum* to say—if the Commission may set aside § 4 and the rights, privileges and protections which it accords to a natural gas company subject to all of the obligations of the Act, then there is no end to the legislative tampering which the Commission may undertake. It may just as well deny the producer the right of review by rehearing or petition to the Courts under § 19(b).[18] Or it might

[18] Any specialized treatment of pending certification applications likewise tends to imperil either the utility, or the broad legality, of the area pricing system envisaged in 61–1. By its terms the rates specified in the appendix "are for the purpose of guidance and initial action by the Commission" for use by it "in the absence of compelling evidence calling for other action" in passing upon "proposed initial sales" and "* * * rate changes filed under existing contracts which call for a rate exceeding the indicated price level * * *."

[19] As to this we are not here dealing with academic theorectical. For the Producer, pursuing essentially what the Commission has done with regard to the post-record letter of No-

just as well conclude that the producer's operations are uneconomic because of doubtful reserves or a current exploration program and condition the grant of a temporary on divestment of unprofitable leases or the cessation of wildcat drilling.[20]

vember 2, 1961, has brought to our attention a current temporary (Docket No. C162-216 of October 6, 1961) in which to a condition [2] fixing the rates to "remain in effect until changed by Commission order" the Commission attaches another condition that the producer not seek any rehearing or review:

"(3) The temporary authorization with conditions attached shall be accepted as issued and without reservations for further review after commencement of service, within 30 days herefrom by written acceptance * * *. If reconsideration of such temporary authorization is sought, service hereunder shall not be started. If service is commenced under this authorization, the conditions attached shall be effective and the service may not be discontinued without permission of the Commission * * *."

[20] So long as FPC v. Panhandle Eastern Pipe Line Co., 1949, 337 U.S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499, stands, § 1(b) denies power to do this.

The condition is erroneous on its face and the cause must be reversed and remanded for further consistent proceedings.[21]

Congress has subjected a temporary natural-gas producer to § 4 and all other parts of the Act. Congress has extended to all natural gas companies, permanent or temporary, the protection and rights of § 4 and the Act. Each is interlocked.

That which Congress had joined together, let not the Commission put asunder.

REVERSED AND REMANDED.

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[21] We do not undertake to blueprint the matters requiring reconsideration. But it is quite clear that as condition [1] as amended (notes 6, 8, 10) was illegal and void, the filing of the amended contract and the proposed rate increase were legal. The rate represented by the proposed increase became effective on its filing subject to a maximum of five months' suspension. But since it is a certainty that the Commission would have exercised the right of suspension, the collection thereafter must be deemed to have been under an order for refund.

Adm. Office, U.S. Courts—Scofields' Quality Ptrs., Inc., N.O., La.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19213

H. L. HUNT, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before BROWN, WISDOM and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of H. L. Hunt for Review of Orders of the Federal Power Commission issued on May 31, 1961 and July 26, 1961, in Docket No. C161-1282, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, reversed; and that this cause be, and it is

hereby remanded to the Commission for further consistent proceedings in accordance with the opinion of this Court.

Issued: July 19, 1962.[1]

[1] The judgments involving the other respondents (petitioners below) are identical in form.

APPENDIX C

STATUTES INVOLVED

The Natural Gas Act, Section 4, 15 U.S.C. 717c and Section 7(b), (c), and (e), 15 U.S.C. 717f(b), (c) and (e), provides as follows:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the

date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company [1] or upon its own initiative without complaint, at once, and if it so orders, without answer or

[1] Subsection 4(e) was amended May 21, 1962 by Public Law 87-454, 87th Congress, 2d Session [S. 1595], 76 Stat. 72.

formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or

charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

* * * * *

Sec. 7 * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless

[1] Subsection 7(c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorising such acts or operations. * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)][1]

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[1] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H.R. 6586], 52 Stat. 825, Section 7(c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have

(e)[4] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present

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been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

[4] See footnote 2.

or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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